Supreme Court, U.S.
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No. 88-425

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

ROBERT A. LEVY,

PETITIONER,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA,
UNIVERSITY OF CALIFORNIA, DAVIS,
UNIVERSITY OF CALIFORNIA, BERKELEY,
PROFESSOR DOUGLAS McCOLM,
PROFESSOR WILLIAM KNOX,
EDWARD J. BLAKELY,
PROFESSOR JACK M. HOLLANDER, in their
individual and official capacities, and
DOES I - XXX,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION THREE

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

SYNOPSIS

Respondents' Opposition raised a valid point concerning this Court's discretionary authority. Petitioner addresses this matter, showing that the Opinion of the California appellate court imposes increased and unprecedented burdens on discrimination plaintiffs, thereby significantly reducing their access to the anti-discrimination statutes. Petitioner urges that this is a matter of sufficient importance to merit review by this Court on writ of certiorari.

STATEMENT OF THE CASE

The record speaks for itself as to whether or not the opinion of the Court of Appeal gives a full factual recitation of the case. Respondents' remarks concerning the factual and legal situation are mere

assertions, without substantive support. It is clear from the record that petitioner did make a prima facie showing of age discrimination, did show that respondents' articulated reasons for not hiring him were pretextual, and did present competent evidence that respondents' decisions were motivated by age discrimination.

JURISDICTIONAL QUESTIONS

Respondents correctly pointed out however, that this Court does not sit simply to resolve disputes between the litigants before it, Rice v. Sioux City Cemetery, 349 U.S. 70 (1955), and that certiorari will be granted only when there are special and important reasons therefor, as set forth in Supreme Court Rule 17.1. These points are addressed as follows:

A. JURISDICTION UNDER RULE 17.1

Under Rule 17.1(b), the Supreme Court of California decided a federal question in a way in conflict with federal courts of appeals (infra).

Under Rule 17.1(c), The Supreme Court of California decided a federal question in a way in conflict with applicable decisions of this Court (infra).

B. THE CONFLICT AND ITS CONSEQUENCES

1. DIVERGENCE IN CASE LAW AUTHORITY

Federal and state authority regarding summary judgment in discrimination cases under Title VII and ADEA does not run in an unbroken line as asserted by respondents but forms two divergent branches. One line of cases holds that summary judgment is generally precluded when plaintiff establishes a prima facie case, Haydon v. Rand, 605 F 2d

453, 455 (9th Cir. 1979), Lowe v. City of Monrovia, 775 F 2d 998, 1009 (9th Cir. 1985), Williams v. Edward Apffels Coffee Co., 792 F 2d 1482, 1486 (9th Cir. 1986), Ibarbia v. Regents of the University of California, 234 Cal.Rptr. 167, 171 (1987).

The other line of authority holds that when a defendant articulates a legitimate non-discriminatory reason for the adverse employment decision to rebut plaintiffs' prima facie case, the plaintiff must come forth with additional facts to specifically dispute such reasons in order to avoid summary judgment, Ruffin v. County of Los Angeles, 607 F 2d 1276, 1280 (9th Cir. 1979), Steckl v. Motorola 703 F 2d 392, 393 (9th Cir. 1983), Cotton v. City of Alameda, 812 F 2d 1245, 1248 (9th Cir. 1987).

2. FFFECT ON PROCEEDINGS IN INSTANT CASE

This divergence in case law

authority resulted in some confusion in the instant case. In the summary judgment proceedings it was generally conceded that petitioner had established a prima facie case, the issue being whether or not he had presented additional facts sufficient to establish an issue of pretext. The trial court granted summary judgment on this question.

By the time the case came up for consideration in the Court of Appeal, several new cases appeared reaffirming the sound doctrine that summary judgment was inappropriate when plaintiff establishes a prima facie case. Consequently, respondents concentrated on attempts to show that petitioner failed to establish a prima facie case, including introducing arguments and facts not asserted in the summary judgment proceedings.

3. UNPRECEDENTED BURDENS INTRODUCED IN APPELLATE COURT'S OPINION

The Court of Appeal, following its decision in Ibarbia, held to the view that establishment of the prima facie case is sufficient to preclude summary judgment, but it changed the standards for establishing the prima facie case. Moreover, it changed these standards to such an extent that its resulting opinion and the doctrines resulting therefrom failed to conform to either of the above-mentioned branches of authority, and introduced unprecedented burdens on a plaintiff seeking redress under the statutes.

In particular, the Court of Appeal altered the settled standards for determining the following elements of the McDonnell-Douglas model for a prima facie case: 1) The criteria for establishing whether or not plaintiff applied for the

job, 2) The criteria for establishing plaintiff's qualifications for the job, and 3) The criteria for the age of the person hired instead of plaintiff. These elements are examined individually:

a. THE APPLICATION.

The opinion introduces the notion that a plaintiff must not only apply for a job but also follow up on his application, resulting in a significant increase in the burden placed on a plaintiff. Furthermore, the opinion disregards the chilling effects of and discouragement due to past discrimination in evaluating a plaintiff's justifiable failure to complete an application, Pearson v. Furnco Construction Co, 563 F 2d 815, 818 (1977), and other cases cited in the Petition. In addition, the opinion requires not only that the plaintiff introduce facts tending to show he applied for a job, but it also

resolves all doubts concerning such evidence against the plaintiff (the non-movant in summary judgment proceedings).

b. QUALIFICATIONS

It is settled law that at the prima facie stage a plaintiff need only show that he meets the objective qualifications for the position, Foster v. Arcata Associates, 772 F 2d 1453, 1460 (9th Cir 1985). The opinion on the other hand seems to require that plaintiff's qualifications match or exceed those of the person hired (and even those of other candidates not hired), in effect placing the burden of showing pretext into the prima facie stage, and expanding that burden in the process. And any matters about which the record is silent or doubtful are resolved against the plaintiff, again placing an unjustifiable and unprecedented burden on the plaintiff.

c. AGE OF REPLACEMENT

It is settled law that a plaintiff need show only that he was replaced by someone substantially younger than he, but not necessarily outside the protected age group, C.F.R. 1625.2(a) and cases cited in the Petition. The opinion of the Court of Appeal enunciates the doctrine that a prima facie case cannot be made unless the person hired instead of plaintiff is outside the protected age group, again placing an additional burden on the plaintiff.

CONCLUSION

Thus the California Court of Appeal, by the introduction of new and unprecedented requirements, has drastically increased the burden placed on a plaintiff seeking to establish a prima facie case of discrimination, in conflict with clearly stated criteria set out by

this Court, Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) (burden of establishing a prima facie case of disparate treatment is not onerous).

These alterations of the criteria for establishing the prima facie case make it virtually impossible to overcome a motion for summary judgment, and if allowed to stand, will have far-reaching consequences on employment discrimination law, to the point of rendering the protective statutes meaningless.

For these reasons, petitioner prays that this Court will grant his petition for writ of certiorari.

Dated: September 27, 1988.

Respectfully submitted,

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